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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 77-169

REUBEN GOLDSTEIN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioner, REUBEN GOLDSTEIN, respectfully prays that a Writ of Certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on May 27, 1977. A petition for rehearing and a suggestion for rehearing en banc was denied on June 30, 1977.

OPINIONS BELOW

The opinions of the United States Court of Appeals for the Fifth Circuit, not yet reported, appear in Appendix "A" attached hereto.

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Whether a conflict is present between the Circuit Courts of Appeal as to the interpretation of Title 18 U.S.C.A. §2518(1)(c).

2. Whether the Government's attempt to comply with Title 18 U.S.C.A. §2518(1)(c) was inadequate in that affidavits submitted for this purpose were conclusory and did not provide sufficient facts from which a detached judge could determine whether alternate, viable investigative procedures existed, and whether such failure to so comply is grounds for suppression of the seized conversations.

STATUTE INVOLVED

Title 18 U.S.C.A. §2518(1)(c). Procedure for interception of wire or oral communications.

> (1) Each application for an order authorizing or approving the interception of a wire or oral communication *shall* be made in writing upon oath or affirmation to a judge of competent jurisdiction and *shall* state the applicant's authority to make such application. Each application *shall include* the following information:
>
> * * *
>
> (c) a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous. (Emphasis Supplied)

STATEMENT OF THE CASE

Petitioner, and his two co-defendants, were indicted for violations of 18 U.S.C. §1952 in the United States District Court for the Southern District of Florida in April of 1974. Pretrial Motions were filed by all defendants. On September 26, 1974, Petitioner GOLDSTEIN'S Motion to Suppress evidence derived from electronic interceptions was granted by the District Court. After the Government moved for clarification of the Court's Order, the District Court modified said order and denied the Motion to Suppress. The three defendants proceeded to trial by jury, the Honorable C. CLYDE ATKINS presiding.

The jury returned guilty verdicts as to Petitioner GOLDSTEIN on Counts 1, 3, 5 and 7 on March 12, 1975. Following the trial, convictions and sentencing, this Petitioner, along with his co-defendants, appealed the judgments to the United States Court of Appeals for the Fifth Circuit and that Court affirmed.

The Petitioner contends that the Government attempted to fulfill the requirement of 18 U.S.C. 2518(1)(c) through affidavits submitted by Special Agent WILLIAM F. HEIST, of the Federal Bureau of Investigation. The Petitioner herein submits that the language contained in two affidavits, referred to above, is simply bald conclusions, and not facts from which the Attorney General or the authorizing judge could have properly determined whether normal investigative procedure were viable alternatives to electronic surveillance. In fact, certain of the language contained in the affidavits relevant to this issue indicate that the normal investigative procedures discussed by Agent HEIST do not always suffice in the gathering of sufficient evidence to prove the offenses for which interception was sought, leaving the distinct impression that, on occasions, other investigative techniques do suffice. Further, in an affidavit dated June 7, 1973, Agent HEIST stated that "records that have been seized in the past in bookmaking and gambling cases have *often not* been sufficient to establish all the elements required to prove that a violation of Federal Statutes exists because such records are *often* extremely

difficult to interpret and on *many occasions* are of little or no significance without further knowledge of the bookmaker or gamblers activities". (Emphasis Supplied). Thus it is reasonable, if not obvious, that there are occasions when these records are sufficient to establish a federal crime. The same type of language is contained in an affidavit of June 27, 1973, wherein Agent HEIST stated that "Standard investigative techniques have not succeeded in providing evidence to sustain prosecution in this case . . .". However, this statement, alone, is the bald conclusion of Agent HEIST and does not appear to Petitioner GOLDSTEIN to be anything more than a mere conclusion, not providing sufficient facts from which a detached judge could determine whether the other alternative investigative procedures were in fact viable. Agent HEIST continued by stating that the investigation to that point using other investigative techniques had not resulted in sufficient evidence to proceed to indictment; the basis for this conclusion was Agent HEIST'S experience and the experience of other special agents using verbage similar to the verbage contained in the June 7, 1973, affidavit.

REASONS FOR GRANTING THE WRIT

I.

A CONFLICT EXISTS WITHIN THE CIRCUITS AS TO THE INTERPRETATION OF WHAT IS REQUIRED PURSUANT TO THE DICTATES OF 18 U.S.C. 2518(1)(c).

The Fifth Circuit in the instant case reaches a conclusion which is in conflict with the Ninth Circuit's decision in United States v. Kalustian, 529 F.2d 585 (9th Cir., 1975), a copy of which is set forth in Appendix "B" attached hereto.

II.

THE GOVERNMENT FAILED TO COMPLY WITH THE PROVISIONS CONTAINED IN TITLE 18 U.S.C.A. 2518(1)(c) SINCE THE AFFIDAVIT SUBMITTED WAS BASED ON CONCLUSORY ALLEGATIONS AND DID NOT PROVIDE SUFFICIENT FACTS FROM WHICH A DETACHED JUDGE COULD DETERMINE WHETHER ALTERNATE, VIABLE INVESTIGATIVE PROCEDURES EXISTED: SUCH FAILURE REQUIRES SUPPRESSION OF THE SEIZED CONVERSATIONS.

In support of this argument, the Petitioner, REUBEN GOLDSTEIN, relies upon *United States v. Kalustian,* 529 F.2d 585 (9th Cir., 1975), in which the Ninth Circuit Court of Appeals held that affidavits that rely on conclusory allegations and boilerplate language to show the unavailability of other investigative techniques are insufficient to meet the standard set forth in Title 18 U.S.C.A. 2518(1)(c) which provides that applications for wire interceptions include:

> "a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous."

After a comparison of the assertions in these affidavits with those of *Kalustian,* it is submitted that the statements herein are no more adequate in satisfying section 2518(1)(c) than those in the *Kalustian* case. Nowhere in the present applications does the Government adequately show why other investigatory techniques are not adequate for this particular case. The mere conclusions of the affiant, based upon his experience and the experience of others, and the fact that in the past searches have not "*always*" resulted in adequate evidence, are insufficient, and do not "provide facts from which a judge or magistrate could determine whether other alternative investigative procedures exist as a viable alternative", *United States v. Kalustian, supra.*

Wiretapping must only be authorized if the precise requirements of Title III are conformed to by the Government; "Few threats to liberty exist which are greater than that posed by the use of eavesdropping devices". *Berger v. United States,* 388 U.S. 41, 63 (1971). This Court's review of the wiretap authorization must insure compliance with the statute, and must insure that the issuing judge performed his duties properly and did not "serve merely as a rubber stamp for the police". *United States v. Ventresca,* 380 U.S. 102, 109 (1965).

Notwithstanding the deficiency of the affidavit in the instant case under the *Kalustian* standard, the Court Below indicated that the Fifth Circuit's opinions preclude a reading of the affidavit in the same fashion as would the Ninth Circuit, citing *United States v. Robertson,* 504 F.2d 289 (5th Cir., 1974); *United States v. Pacheco,* 489 F.2d 554 (5th Cir., 1974); and *United States v. McCoy,* 539 F.2d 1050 (5th Cir., 1976).

CONCLUSION

Because of the inconsistency in the standards set forth by these decisions, and since this issue is one of the few issues which remain extant in the challenge to affidavits and applications in wiretap situations, it is respectfully requested that the Petition for a Writ of Certiorari should be granted.

Respectfully Submitted:

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CERTIFICATE OF SERVICE BY MAILING

The undersigned hereby certifies that three true and correct copies of the above and foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit was, on this 29th day of July, 1977, mailed, postage prepaid, to the Honorable WADE H. McCREE, JR., Solicitor General, United States Department of Justice, Washington, D.C. 20530.

CLB PUBLISHERS

By */s/ Phillip A. Johnson*

Appendix "A"

UNITED STATES of America,
Plaintiff-Appellee,

v.

Martin SKLAROFF, Reuben Goldstein,
and Pearl Leppo, a/k/a Earl Leppo,
Defendants-Appellants.

No. 75-2116.

United States Court of Appeals,
Fifth Circuit.

May 27, 1977.

Defendants were convicted in United States District Court for the Southern District of Florida at Miami, C. Clyde Atkins, J., of using interstate telephones to promote, facilitate, or carry on unlawful gambling activity contrary to state and federal laws and they appealed. The Court of Appeals, Lewis R. Morgan, Circuit Judge, held that (1) failure of application for interception order to identify defendant as person committing the offense and whose communications were to be intercepted did not require suppression of the evidence obtained; (2) application complied with requirement that application include statement as to whether other investigative procedures had been tried and failed or why they reasonably appeared to be unlikely to succeed if tried or to be too dangerous; requirements that each application disclose all previous applications requires disclosure of only those previous applications directed at the persons for whom the subsequent application is made; and (3) reference to defendant's silence when he was advised of his rights was harmless error where only one reference was made and the reference resulted from a spontaneous remark by the prosecution.

Affirmed.

1. Criminal Law 394.3

Failure of application for interception order to identify defendant as person committing the offense and whose communications were to be intercepted did not require suppression of evidence obtained against defendant. 18 U.S.C.A. §2518(1)(b)(iv).

2. Telecommunications 496

Application for interception order contained sufficient statement that other investigative procedures had been tried and failed or reasonably appeared to be unlikely to succeed if tried or to be too dangerous. 18 U.S.C.A. §2518(1)(c).

3. Telecommunications 496

Statutes providing that application for interception order shall contain statements of all previous applications requires disclosure of only those previous applications directed at the person for whom the subsequent application is made. 18 U.S.C.A. §2518(1)(e).

4. Attorney General 2

Statute providing that any attorney specially appointed by the Attorney General may, when specifically directed by the Attorney General, conduct any kind of legal proceeding, including grand jury proceedings, is a grant of authority, not a limitation. 28 U.S.C.A. §515(a).

5. Grand Jury 34

Letter of appointment for special attorney who presented case to grand jury complied with statute as against defendants' contention that the special attorney was not "specifically directed" within meaning of statute to present the indictment against defendants. 28 U.S.C.A. §515(a).

6. Criminal Law 1169.12

Testimony of government witness that defendant remained silent when advised of his rights was harmless error where only one

reference to defendant's silence was made and that reference was neither made nor elicited by the prosecution, but instead resulted from a spontaneous remark made by the witness.

Appeal from the United States District Court for the Southern District of Florida.

Before MORGAN, CLARK and TJOFLAT, Circuit Judges.

LEWIS R. MORGAN, Circuit Judge:

Defendants Sklaroff,[1] Goldstein and Leppo were charged in a nine count indictment in the United States District Court for the Southern District of Florida with violating 18 U.S.C. §1952[2] through the use of interstate telephones to promote, facilitate, or carry on unlawful gambling activity contrary to the laws of Florida and of the United States. The Government introduced evidence to establish that between June 13, 1973 and July 8, 1973, the defendants made interstate telephone calls to carry on unlawful

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[1]Defendant Martin Sklaroff having died while this appeal was pending, his appeal has been dismissed.

[2]18 U.S.C. §1952 reads as follows:

> (a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—
> (1) distribute the proceeds of any unlawful activity; or
> (2) commit any crime of violence to further any unlawful activity; or
> (3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,
> and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.
>
> (b) As used in this section 'unlawful activity' means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics, or prostitution offenses in violation of the laws of the State in which committed or of the United States.
>
> (c) Investigations of violations under this section involving liquor or narcotics shall be conducted under the supervision of the Secretary of the Treasury.

gambling activity. That is, Reuben Goldstein, operating out of Las Vegas, often called Martin Sklaroff, a Miami bookmaker and gave him "line information," or the odds, on various professional baseball games. Typically, several minutes after Goldstein's call, Earl Leppo, a bookmaker operating in the Boston area, called Sklaroff, received the line information, and then placed substantial bets with Sklaroff. In addition to FBI surveillance and identification testimony, testimony of three of Sklaroff's gambler-customers, testimony of an FBI expert on bookmaking, telephone records, and bookmaking paraphernalia and records seized from the defendants pursuant to a search warrant, the Government's evidence included tapes of conversations between Goldstein and Sklaroff and between Leppo and Sklaroff. These tapes were the product of electronic surveillance of four Sklaroff telephones in the Miami area. Authorized by Judge Roettger of the United States District Court of Florida pursuant to Title III of the Omnibus Crime Control and Safe Streets Act of 1968, as amended, 18 U.S.C. §§ 2510-2520, the first surveillance was conducted between June 11 and June 13, 1973. Agents halted the interception on June 13 when they learned that Sklaroff was switching his operations to a different location and to different telephones. After receiving a second application, supported by an affidavit from Marilu Marshall, a special attorney with the Miami Strike Force, Judge Roettger issued another order authorizing the interception of wire communications of "Martin Sklaroff, Reuben Goldstein and others, as yet unknown" for a second fifteen day period. Agents then conducted interceptions of two phones used by Sklaroff in Miami, beginning the electronic surveillance of June 28, 1973 and terminating it on July 9.

[1] Defendants' primary contentions of error deal with alleged deficiencies in the application for an interception order that the task force attorney submitted to Judge Roettger. First, they argue that the failure of the task force to identify Earl Leppo in

either of their applications violated 18 U.S.C. §2518(1)(b)(iv),[3] which requires that each application identify all known persons who are committing the offense and whose communications are to be intercepted. Appellants argue that Department of Justice attorneys had probable cause to believe that Earl Leppo was committing the offenses under investigation and violated §2518(1)(b)(iv) by not listing him on their applications. In *United States v. Doolittle,* 507 F.2d 1368, aff'd *en banc,* 518 F.2d 500 5th Cir. 1975), *cert. denied* 423 U.S. 1008, 96 S. Ct. 439, 46 L.Ed.2d 380 (1977) we upheld the admission of evidence from a wiretap against several defendants whom the Government allegedly had probable cause to believe would be involved in the ongoing criminal activity, but who were not named in the wiretap application, on the ground that the defendants had not demonstrated any prejudice in not being named in the application and that defendants had presented no evidence of Governmental bad faith. In a recent holding, however, the Supreme Court had held that while Title III requires the Government to name on its wiretap application any person whom it has probable cause to believe is engaged in the criminal activity under question, failure to meet this requirement does not require suppression of the evidence produced.[4] *U.S. v. Donovan,* —— U.S. —— , 97 S. Ct. 658, 50

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[3]18 U.S.C. §2518(1)(b)(iv) states:

> Each application for an order authorizing the interception of a wire or oral communication shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:
>
> . . . . . .
>
> (b) a full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued, including . . . (iv) the identity of the person, if known, committing the offense and whose communications are to be intercepted;

[4]While the opinion in *Donovan* apparently rejects that part of our holding that made a showing of prejudice a ground for suppressing a wiretap based on an application that did not name all "known persons," it did not decide whether proof of Governmental bad faith in not disclosing all such persons would justify suppression. *See United States v. Donovan,* ____ U.S. ____ at ____ , 97 S. Ct. 658 at 672, 50 L.Ed.2d 652, at 673 n.23 (1977). Because appellants do not allege or show such bad faith, we do not have to decide that question in this case.

L.Ed.2d 652 (1977). Therefore, according to *Donovan*, even assuming that Leppo was a "known person" who should have been named in the application, the Government's failure to do this does not require suppression of the evidence obtained against him.

[2] Appellant Goldstein argues that the application did not comply with either §2518(1)(c) or §2518(1)(e) and that, as a result, evidence obtained through electronic surveillance made pursuant to those deficient applications should be suppressed. 18 U.S.C. §2518(1)(c) provides that applications for wire interceptions include:

> [a] full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous.

Appellant contends that the Government's attempt to comply with this requirement was inadequate in that affidavits submitted for this purpose were conclusory and did not provide sufficient facts from which a detached judge could determine whether alternate, viable investigative procedures existed. In support of his argument, appellant Goldstein cites *United States v. Kalustian*, 529 F.2d 585 (9th Cir. 1975), in which the Ninth Circuit held that affidavits that rely on conclusory allegations and boilerplate language to show the unavailability of other investigative techniques are insufficient to meet the standard set forth in §2518(1)(c). Yet, this court has held that §2518(1)(c) "must be read in a common sense fashion." *United States v. Robertson*, 504 F.2d 289 (5th Cir. 1974), *cert. denied* 421 U.S. 913, 95 S.Ct. 1568, 43 L.Ed.2d 778. Accordingly, the purpose of the statute "is not to foreclose electronic surveillance until every other imaginable method of investiation [has] been unsuccessfully attempted, but simply to inform the issuing judge of the difficulties involved in the use of conventional techniques." *United States v. Pacheco*, 489 F.2d 554, 565 (5th Cir. 1974). *Kalustian* notwithstanding, this court has recently examined an affidavit containing the same allegations that appellant argues in this case are inadequate and ruled that it complies with §2518(1)(c). Thus,

in *United States v. McCoy,* 539 F.2d 1050 (5th Cir. 1976), we held that in order to uphold a wiretap order, the affidavit must only supply a "factual predicate" adequate to support the judge's implicit finding that "[the] 'investigative procedures appear unlikely to succeed.' " *Id.* at 1055-56. In that case, the panel held to be an adequate factual predicate an affidavit stating that based on the FBI agent's experience in investigating gambling offenses and on the fact that searches of gamblers usually failed to prove all the elements of federal offenses, particularly with respect to participants not present at the searched premises, that gamblers often do not keep permanent records, that temporary records are often destroyed during a search and are often in a code that is difficult to decipher, that FBI informants would be unwilling to testify, and that physical surveillance would jeopardize the investigation, electronic surveillance was necessary. The allegations contained in the affidavit under attack in this case being almost identical to those approved in *McCoy,* we likewise hold that the application in question complied with §2518(1)(c).

[3] In his final attack on the adequacy of the application for a wiretap order, appellant Goldstein argues that the Government did not comply with 18 U.S.C. §2518(1)(e), which requires each application to contain

> a full and complete statement of the facts concerning *all previous applications* known to the individual authorizing and making the application made to any judge for authorization to intercept, or for approval of interruptions of wire or oral communications *involving any of the same persons, facilities or places specified in the application,* and the action taken by the judge on each such application.

(Emphasis added). In its application to intercept communications of Sklaroff and Goldstein, the Government listed three previous applications for wire interceptions of Sklaroff and Goldstein, two for the former and one for the latter. Appellant Goldstein contends, however, that it failed to mention one wiretap application in which he was involved and that this non-compliance with §2518(1)(e) mandates suppression of the tapes obtained pursuant to Judge Roettger's two orders. Specifically, Goldstein alleges

that the Government did not inform Judge Roettger that Goldstein's conversations were overheard on a 1971 interception authorized by the United States District Court for the Eastern District of Tennessee. Goldstein concedes that he was not a target of the application, itself, in that the application was directed at "James Alexander Clark, a/k/a "Butterball," David R. Thomas, a/k/a "Ross Thomas," and others as yet unknown." Rather, he argues that because the affidavit submitted in support of the application discussed some of his gambling activities with Clark and Thomas, this application should have been brought to Judge Roettger's attention. Several courts, including this one, have held that an application to intercept conversations of a particular individual does not have to reveal a prior interception of that individual's conversations when that person was not the target of the application seeking the prior interception. *See United States v. Florea,* 541 F.2d 568 (6th Cir. 1976); *United States v. Kilgore,* 518 F.2d 496 (5th Cir. 1975), reh. denied, 524 F.2d 957, cert. denied, ____ U.S. ____ , 97 S.Ct. 1173 (1977). *United States v. Bellosi,* 163 U.S.App.D.C. 273, 51 L.Ed.2d 581, 501 F.2d 833,839 n.13 (1974); *United States v. O'Neill,* 497 F.2d 1020 (6th Cir. 1974); *United States v. Chiarizio,* 388 F. Supp. 858 (D. Conn. 1975). In other words, if the Government submits an application to intercept the calls of John Doe and during their surveillance of him record conversations with Jane Roe, a subsequent application to intercept Jane Roe's calls does not have to refer to the John Doe application to satisfy §2518(1)(c). Here, appellant argues that discussion of his gambling activities in an affidavit supporting a Title III applicaton made him a target of that application and rendered that application subject to §2518(1)(c). We disagree. An affidavit is submitted to justify an interception order by furnishing evidence of the Government's probable cause to believe that the named targets of the application are engaging in illegal gambling activities. In an effort to establish probable cause to conduct surveillance of the named individuals, the affidavit might discuss the activity of numerous people not named as targets of the investigation. It does not follow, however, that anyone listed in the affidavit is thereby deemed a target of the investigation

subject to the dictates of §2518(1)(c). We also find appellant's reliance on *United States v. Bellosi*, 163 U.S. App. D.C. 273, 501 F.2d 833 (1974), to be misplaced. In *Bellosi*, the District of Columbia Court of Appeals held that the Government violated §2518(1)(c) when it purposely did not disclose in its applications that one of the intended targets had also been a target of an earlier application. Here, Goldstein was not a target of the Tennessee application. Likewise, the Government listed three prior interception applications directed at Sklaroff and Goldstein, so that no inference that it was trying to hide any previous interceptions is justified. In short, we hold that §2518(1)(c) requires disclosure of only those previous *applications* directed at the person for whom the subsequent application is made.

[4,5] Appellants also contend that the attorney who presented the case to the grand jury—Martin Steinberg, a special attorney with the United States Department of Justice—was not *specifically directed*, within the meaning of 28 U.S.C. §515(a), to present this indictment against defendants and that the indictment must therefore be dismissed. Section 515(a) states:

> The Attorney General or any other officer of the Department of Justice, or any attorney specially appointed by the Attorney General under law, may, when specifically directed by the Attorney General, conduct any kind of legal proceeding, civil or criminal, including grand jury proceedings and proceedings before committing magistrates, which United States attorneys are authorized by law to conduct, whether or not he is a resident of the district in which the proceeding is brought.

The Department of Justice hired Steinberg as an attorney on June 12, 1972 and the Assistant Attorney General for the Criminal Division, Henry Petersen, appointed him to the Miami Strike Force on November 30, 1972 with the following directive:

> to assist in the trial of [violation of federal criminal statutes by persons whose identities are unknown] in the Southern District of Florida and other judicial districts in the United States in which the Government is interested. In that connection you are specially authorized and directed . . . to conduct . . . any kind of legal proceedings . . . including

> grand jury proceedings . . . which United States attorneys are authorized to conduct.[5]

Appellants contend that Steinberg's commission did not "specifically direct" him to appear before the grand jury pursuant to 28 U.S.C. §515(a). This argument has been rejected in all circuits that have considered it. *See United States v. Prueitt*, 540 F.2d 995 (9th Cir. 1976); *Infelice v. United States*, 528 F.2d 204 (7th Cir. 1975); *In Re Grand Jury Subpoena of Persico*, 522 F.2d 41 (2nd Cir. 1975); *United States v. Wrigley*, 520 F.2d 362 (8th Cir. 1975), *cert. denied*, 423 U.S. 987, 96 S. Ct. 396, 46 L.Ed.2d 304. In *United States v. Wrigley*, 520 F.2d 362 (9th Cir. 1975), the Ninth Circuit, rejecting the defendant's argument that a letter of appointment identical to the letter being attacked in this case was too broad and failed to give specific direction in the grant of authority, held that the statute does not limit the employment of special attorneys to particular types of cases identified as unusually important or requiring particular expertise; the statute is a grant of authority, not a limitation. *Id.* at 364-68. We concur and hold that the letter of appointment for special attorney Steinberg complied with §515(a).

Finally, appellant Leppo argues that the trial judge should have granted a mistrial when a Government witness commented on his silence at the time of his arrest after he had been given his Miranda warnings. At trial, to lay the foundation for evidence seized from Leppo, agent Jansen, who executed the search warrant, testified:

> I executed a search warrant to his person, and he was advised of his rights according to the Advice of Rights form.[6]

Defense counsel for Sklaroff, Mr. Hogan, objected:

> Your Honor, I object. Whether he was advised of his rights is immaterial. It violates his rights under the Fifth Amendment of the United States in implying that he had a duty to speak. The Government has not provided us with

[5]R., Vol. III, p. 789.

[6]R., Vol. VII, p. 408.

> statements of any witnesses and therefore I would object to this line of questioning.[7]

The judge overruled his objection and at that moment the witness, spontaneously replying to defense counsel's remarks, stated, "Mr. Leppo declined to make any statement."[8] Defense counsel immediately objected to the witness' remark and the trial judge sustained their objections, instructing the jury that a defendant has an absolute right not to say anything during his arrest or trial. After he denied counsel's motion for a mistrial, the judge again instructed the jury to disregard the witness' statement. Likewise in his final instructions to the jury, without making a direct reference to the incident, he stated that a defendant does not have to introduce any evidence or prove his innocence.

[6] The Supreme Court has held in *Doyle v. Ohio*, 426 U.S. 610, 96 S. Ct. 2240, 49 L.Ed.2d 91 (1976), that the due process clause forbids the prosecution from using evidence of a defendant's post-arrest, post-Miranda warning silence either for substantive or impeachment purposes. In two cases announced since *Doyle*, this court has found an infraction of the *Doyle* rule, but has also held that violation to constitute only harmless error. Thus, noting that the prosecutor did not "focus on" or "highlight" defendant's silence in his cross-examination and closing remarks and that the prosecutor's comments did not strike at the "jugular" of the defendant's story this court held to be harmless error the prosecution's elicitation of the defendant's silence during his arrest. *United States v. Davis*, 546 F.2d 583 (5th Cir. 1977). Likewise, in *Chapman v. United States*, 547 F.2d 1240 (5th Cir. 1977), a panel of this court held another prosecutorial question on the defendant's post-Miranda warning silence to be harmless error, noting that "when there is but a single reference at trial to the fact of defendant's silence, the reference is neither repeated nor linked with defendant's

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[7]R., Vol. VII, p. 409.

[8]*Id.*

exculpatory story, and the exculpatory story is transparently frivolous and evidence of guilt is otherwise overwhelming, the reference to defendant's silence constitutes harmless error." *Id.* at p. 1250. That standard was met here, for in this case there was only one reference to the defendant's silence and that reference was neither made nor elicited by the prosecution, but instead resulted from a spontaneous remark made by the witness. The prosecution never again mentioned the witness' comment and the judge adequately instructed the jury to disregard the comment. Further, no circumstance in Leppo's case gave rise to any expectation that Leppo, if innocent, would have made a statement at the time of his arrest, for his silence did not contradict any exculpatory story made in his defense, since indeed no such story was told.[9] In short, the fact of his post-Miranda warning silence was irrelevant to the issues presented at trial.

We have examined defendant Leppo's other contentions of error[10] and, finding them to be without merit, we affirm both defendants' convictions.

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[9]Leppo's defense regarding the Government's evidence against him went only to its sufficiency; his defense involved no exculpatory story that a post-Miranda silence would negate.

[10]Leppo's other allegations of error include: the court's failure to sever the Leppo count from the Goldstein count, the court's issuance of an over broad instruction, the Government's withholding of favorable evidence from Leppo, and his conviction upon insufficient evidence.

United States Court of Appeals

EDWARD W. WADSWORTH
CLERK

FIFTH CIRCUIT

OFFICE OF THE CLERK

TEL 504-589-6514
600 CAMP STREET
NEW ORLEANS, LA. 70130

June 30, 1977

TO ALL PARTIES LISTED BELOW:

No. 75-2116 - U.S.A. vs. MARTIN SKLAROFF, *REUBEN GOLDSTEIN* and PEARL LEPPO, a/k/a Earl Leppo

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Dear Counsel:

The enclosed order has this day been entered on petition ( ) for rehearing.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

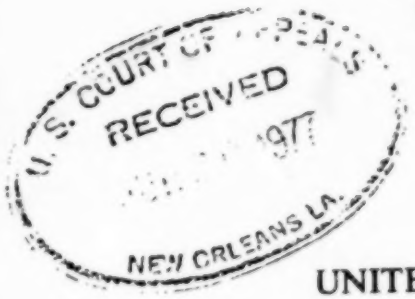
Very truly yours,

EDWARD W. WADSWORTH
Clerk

By /s/ Brenda M. Hauck
Deputy Clerk

CC: Messrs. James J. Hogan
Joseph Mincberg
Messrs. Stephen Stein
Douglas G. Crosby
Messrs. Martin K. Leppo
Richard Gens
Mr. Marc Philip Richman

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT



No. 75-2116

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

MARTIN SKLAROFF, REUBEN GOLDSTEIN,
and PEARL LEPPO, a/k/a Earl Leppo,
Defendants-Appellants.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

ON PETITION FOR REHEARING

(June 30, 1977)

Before MORGAN, CLARK and TJOFLAT, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing on behalf of Earl Leppo filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

/s/ eligible
United States Circuit Judge

APPENDIX B

UNITED STATES of America,
Appellee,

v.

Kale KALUSTIAN, Appellant.

UNITED STATES of America,
Appellee,

v.

Patrick Dale POND, Appellant.

UNITED STATES of America,
Appellee,

v.

Stanley Norman GRAY, Appellant.

UNITED STATES of America,
Appellee,

v.

David SELDITCH, Appellant.

UNITED STATES of America,
Appellee,

v.

Otto Vincent MARINO, Appellant.

UNITED STATES of America,
Appellee,

v.

Leopold OBEZO, Appellant.

UNITED STATES of America,
Appellee,

v.

Mable Linda CUCCIA, Appellant.

No. 74-3314, 74-3315, 74-3305, 74-3264 and 74-3265.

United States Court of Appeals,
Ninth Circuit.

Aug. 4, 1975.

As Amended Dec. 11, 1975.

Rehearing and Rehearing En Banc Denied March 25, 1976.

Defendants were convicted in the United States District Court for the Central District of California, Manuel L. Real, J., of illegal gambling activities, and they appealed. The Court of Appeals, Skopil, District Judge, held that affidavit in support of application for wiretap order was insufficient where it contained mere conclusions and failed to set forth facts adequately showing why traditional investigating techniques of alleged gambling activities by certain named individuals were not sufficient, the Court also held that in order to obtain a wiretap order the Government must inform reviewing judge of every technique which was customarily used in police work in investigating the type of crime involved, and explain why each of them has either been unsuccessful or is too dangerous or unlikely to succeed because of particular circumstances of the case, and an individual's right to privacy which authorization statute seeks to preserve demands no less; it was further held that evidence gathered through invalidly issued wiretap order and its extensions was not admissible.

Reversed and remanded.

1. Telecommunications 496

Procedural steps provided in the Omnibus Crime Control and Safe Streets Act pertaining to electronic surveillance require strict adherence. 18 U.S.C.A. §2510 et seq.

2. Telecommunications 496

The Omnibus Crime Control and Safe Streets Act of 1968 was written to create limited authority for electronic surveillance in investigation of specified crimes thought to lie within the province or organized criminal activities. 18 U.S.C.A. §2510 et seq.

3. Telecommunications 496

Judicial review of wiretap authorization is limited and affidavit in support thereof should not be interpreted in a hypertechnical manner but should be interpreted in a commonsense manner.

4. Telecommunications 496

Within prescribed limits, a close scrutiny must be exercised to determine whether wiretap orders conformed to act authorizing such orders and the review must insure that issuing magistrate properly performed his function and did not serve merely as a rubber stamp for the police. 18 U.S.C.A. §2510 et seq.

5. Telecommunications 496

Affidavit in support of application for wiretap order was insufficient where it contained mere conclusions and failed to set forth facts adequately showing why traditional investigating techniques of alleged gambling activities by certain named individuals were not sufficient. 18 U.S.C.A. §2518(1)(c).

6. Telecommunications 496

In order to obtain a wiretap order the Government must inform reviewing judge of every technique which was customarily used in police work in investigating the type of crime involved, and explain why each of them has either been unsuccessful or is too dangerous or unlikely to succeed because of particular circumstances of the case, and an individual's right to privacy which authorization statute seeks to preserve demands no rest. 18 U.S.C.A. §2518.

7. Searches and Seizures 3.6(3)
Telecommunications 496

Mere conclusions by an affiant are insufficient to justify a search warrant, or a wiretap order and do not provide a basis upon which a detached judge can determine whether other alternative investigative procedures exist as viable alternatives.

8. Criminal Law 394.3

All evidence gathered through electronic surveillance pursuant to an invalid wiretap order and its extensions was inadmissible. 18 U.S.C.A. §2518.

Arthur Lewis (argued), Los Angeles, Cal., for appellant in No. 74-3314.

James A. Twitty, Sp. Atty. (argued), Dept. of Justice, Los Angeles, Cal., for appellee in No. 74-3314.

Edward I. Gritz, Los Angeles, Cal., for appellant in No. 74-3315.

James A. Twitty, Sp. Atty., Los Angeles, Cal., for appellee in No. 74-3315.

David S. Sperber, Los Angeles, Cai., for appellant in No. 74-3305.

William D. Keller, U.S. Atty., Los Angeles, Cal., for appellee in No. 74-3305.

Lee A. Freeman (argued), Los Angeles, Cal., for appellant in No. 74-3264.

Kevin O'Malley (argued), U. S. Dept. of Justice, Los Angeles, Cal., for appellee in No. 74-3264.

James Edward Green (argued), Van Nuys, Cal., for appellant in No. 74-3265.

Kevin F. O'Malley (argued), U. S. Dept. of Justice, Los Angeles, Cal., for appellee in No. 74-3265.

OPINION

Before ELY and HUFSTEDLER, Circuit Judges, and SKOPIL,* District Judge.

SKOPIL, District Judge:

Appellants seek review of their convictions for illegal gambling activities. 18 U.S.C. §§1955 and 2. They claim their motions for suppression of evidence were improperly denied. They also argue that there was insufficient evidence to sustain the verdicts.

According to the Government, confidential informants "advised" federal agents in 1971 that defendant Kalustian was operating a bookmaking operation from the Topper Club (Club) in Rosemead, California. Defendants Pond and Marino, among others, were identified as agents for the operation. On December 20, 1971, the Department of Justice sought court orders authorizing wire taps on three telephones at the Club, one at defendant Stempke's residence, and one at the residence of Patricia Jackson. The application was authorized by Attorney General John Mitchell and granted on December 20, 1971. 18 U.S.C. §2518(1)(c) provides that such applications shall include

> "a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous."

The Government attempted to fulfill that requirement through affidavits supplied by Special FBI Agent James Brent (Affidavits), which essentially contained the following representations:

> "The informants named herein have all said that they will not testify to information they have provided, even if granted immunity. * * *

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*Honorable Otto R. Skopil, Jr., United States District Judge for the District of Oregon, sitting by designation.

"Experience has further established that even though telephone toll records are available which indicate a person is engaged in illicit gambling, the records themselves are not sufficient to prove the gambling activities. Standard investigative techniques have not succeeded in providing evidence to sustain prosecution in this case and would only succeed to a limited degree in establishing that Kale Kalustian, also known as Kelly, Patrick Dale Pond, Otto Vincent Marino, Patricia Jackson, Bill Stempke, and others as yet unknown, are involved in gambling activities over the telephone subscribed to in the name of the Topper Club.***

"Furthermore, such investigative techniques as physical surveillance and the records obtainable on Kale Kalustian, also known as Kelly, Patrick Dale Pond, Otto Vincent Marino, Patricia Jackson, Bill Stempke, and others as yet unknown, contain little probability of success in securing presentable evidence. Based upon my knowledge and experience as a Special Agent of the Federal Bureau of Investigation in the investigation of gambling cases and my association with other Special Agents who have conducted investigation of gambling activities, normal investigative procedures appear to be unlikely to succeed in establishing that the above individuals are involved in gambling activities over the aforementioned telephones in violation of Federal laws. My experience and the experience of other Agents has shown that gambling raids and searches of gamblers and gambling establishments have not, in the past, resulted in the gathering of physical or other evidence to prove all elements of the offense. I have found through my experience and the experience of other Special Agents, who have worked on gambling cases, that gamblers frequently do not keep permanent records. If such records have been maintained, gamblers, immediately prior to or during a physical search, sometimes destroy the records. Additionally, records that have been seized in past gambling cases have generally not been sufficient to establish elements of Federal offenses because such records are difficult to interpret, and many times are of little or no significance without further knowledge of the gamblers' activities. Therefore, the interception of these telephone communications is the only available method of investigation which has

a reasonable likelihood of securing the evidence necessary to prove violation of these statutes. * *

"Wherefore, because of the existence of facts and underlying circumstances of the continuing investigation listed above in paragraphs 4 through 32b, I submit that the probable cause as submitted in paragraphs 3a, 3b and 3d exists; that the extensive normal investigative procedures tried, as set forth in paragraphs 4 through 32b, have failed to gather evidence necessary to sustain prosecution for violation of the offenses enumerated in paragraph 3a, and reasonably appear unlikely to succeed; * * *"

Appellants contend that their motions to suppress the wiretap evidence should have been granted because the Government's application did not satisfy 18 U.S.C. §2518(1)(c). They argue that the supporting affidavits contain bald conclusions rather than facts from which the Attorney General and the judge could determine whether "normal investigative procedures" were viable alternatives to electronic surveillance. §2518(3)(c).

[1] Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (Act), 18 U.S.C. §2510 et seq., absolutely prohibits electronic surveillance by the federal government except under carefully defined circumstances and after securing judicial authority. Procedural steps provided in the Act require strict adherence. *United States v. Giordano*, 416 U.S. 505, 94 S. Ct. 1820, 40 L.Ed.2d 341 (1974). The importance of these procedures reflects the dual purpose of Title III, which is to

"(1) [protect] the privacy of wire and oral communications, and (2) [delineate] on a uniform basis the circumstances and conditions under which the interception of wire and oral communications may be authorized." S. Rep. No. 1097, 90th Cong., 2d Sess., 1968 U.S. Code Cong. & Admin. News, pp. 2112, 2153 (hereinafter cited as "History").

[2] Title III was written to create limited authority for electronic surveillance in the investigation of specified crimes thought to lie within the province of organized criminal activity. History, pp. 2153-2163. It was designed to conform to prevailing constitutional standards. *Berger v. New York*, 388 U.S. 41, 87

S. Ct. 1873, 18 L.Ed.2d 1040 (1967); *Katz v. United States*, 389 U.S. 347, 88 S. Ct. 507, 19 L.Ed.2d 576 (1967). The restraint with which such authority was created reflects the legitimate fears with which a free society entertains the use of electronic surveillance. As stated in *Berger, supra*, "Few threats to liberty exist which are greater than that posed by the use of eavesdropping devices". 388 U.S. at 63, 87 S. Ct. at 1885.

Section 2518(1)(c) of the Act

> "is patterned after traditional search warrant practices and present English procedure in the issuance of warrants to wiretap by the Home Secretary. [citation omitted] The judgment [of the judge or magistrate] would involve a consideration of all the facts and circumstances. * * * Merely because a normal investigative technique is theoretically possible, it does not follow that it is likely. *See Giancana v. United States*, 352 F.2d 921 (7th Cir. 1965), cert. denied, 382 U.S. 959, 86 S. Ct. 437, 15 L.Ed.2d 362; *New York v. Saperstein*, 2 N.Y.2d 210, 159 N.Y. S.2d 160, 140 N.E.2d 252 (1957). What the provision envisions is that the showing be tested in a practical and common-sense fashion. Compare *United States v. Ventresca*, 380 U.S. 102, 85 S. Ct. 741, 13 L.Ed.2d 684 (1965)." History, p. 2190.

[3,4] Our review of the wiretap authorization is limited. We are reminded that

> "[w]here [the underlying circumstances in the affidavit] are detailed, where reason for crediting the source of the information is given, and when a magistrate has found probable cause, the courts should not invalidate the warrant by interpreting the affidavit in a hypertechnical, rather than a commonsense, manner." *United States v. Ventresca, supra* at 109, 85 S. Ct. at 746.

Within our prescribed limits, however, the utmost scrutiny must be exercised to determine whether wiretap orders conform to Title III. The Act has been declared constitutional only because of its precise requirements and its provisions for close judicial scrutiny. *United States v. Bobo*, 477 F.2d 974 (4th Cir. 1973); *United States v. Cox*, 449 F.2d 679 (10th Cir. 1971), *cert. denied*, 406 U.S. 934, 92 S. Ct. 1783, 32 L.Ed.2d 136 (1972);

United States v. Cox, 462 F.2d 1293 (8th Cir. 1972). Our view of wiretap orders must ensure that the issuing magistrate properly performed his function and did not "serve merely as a rubber stamp for the police". *Ventresca, supra* at 109, 85 S. Ct. at 746.

The affidavits set forth facts from which probable cause to infer the operation of a gambling conspiracy could be gleaned. Nearly all of these "facts" trickled into the ears of FBI agents through the efforts of a series of professional gamblers and bookmakers. Unfortunately, as the affidavits attest, none of the underworld informants are willing to testify. The refusal of the informants to testify is a matter for the court to consider in authorizing electronic surveillance. However, standing alone, it may not be sufficient. Evidence of the telephone numbers used by the bookmaking operation and the identities of some of the conspirators could not successfully support a prosecution without that testimony.

Consequently by investigating officials decided electronic surveillance was imperative. They discarded alternative means of further investigation because "knowledge and experience" in investigating other gambling cases convinced them that "normal investigative procedures" were unlikely to succeed. Agent Brent recites that searches are often fruitless because gamblers keep no records, destroy them, or maintain them in undecipherable codes. Use of the phone company's records alone is inconclusive.

The affidavit does not enlighten us as to why this gambling case presented any investigative problems which were distinguishable in nature or degree from any other gambling case. In effect the Government's position is that all gambling conspiracies are tough to crack, so the Government need show only the probability that illegal gambling is afoot to justify electronic surveillance. Title III does not support that view.

> "Congress legislated in considerable detail in providing for applications and orders authorizing wiretapping and evinced the clear intent to make doubly sure that the statutory authority be used with restraint and only where the circumstances warrant the surreptitious interception of

> wire and oral communications. *These procedures were not to be routinely employed as the initial step in criminal investigation.* Rather, the applicant must state that the court must find that normal investigative procedures have been tried and failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous." *United States v. Giordano, supra.* (emphasis added).

The Government's position is further undetermined by the activity of other crimefighting organizations. California, among other states, deprives its policemen of electronic surveillance in all cases. This has not prevented them from successfully prosecuting gambling crimes.

Obviously electronic surveillance can facilitate criminal investigation. Because other investigative techniques are usually slower and more difficult, Congress did not require exhaustion of "all possible" investigative techniques before orders for wiretaps could be issued. *U.S. v. Smith*, 519 F.2d 516 (9th Cir., 1975). But Title III does not allow wiretapping to replace such other techniques unless they "have been tried and failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous".

[5,6] The Government failed in this case to satisfy 18 U.S.C. §2518(1)(c). Its application did not adequately show why traditional investigative techniques were not sufficient in this particular case. A judge reviewing a wiretap application is handicapped without such a showing. Title III and the individual's right to privacy, which it seeks to preserve, demand no less than a full and complete statement of underlying circumstances.

[7] Mere conclusions by the affiant are insufficient to justify a search warrant, *Aguilar v. Texas*, 378 U.S. 108, 84 S. Ct. 1509, 12 L.Ed.2d 723 (1964), or a wiretap order. More specifically, they do not provide facts from which a detached judge or magistrate can determine whether other alternative investigative procedures exist as a viable alternative.

[8] The trial court's order denying appellants' motions for suppression of electronic surveillance evidence is reversed, and all consolidated cases are remanded for a new trial. All evidence

gathered through electronic surveillance pursuant to the original §2518 order and its extensions shall not be admitted in subsequent proceedings.

In view of that ruling, the other issues on appeal are not reached.

REVERSED and REMANDED.